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No. 84-1624

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

A.H. ROBINS COMPANY, INCORPORATED,
Petitioner,

v.

HONORABLE FRANK G. THEIS
Judge of the United States District Court
for the District of Kansas,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF OF PETITIONER

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QUESTION PRESENTED

May a United States district judge rule on factual issues concerning which he has previously been a witness by giving an affidavit in a separate judicial proceeding?

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REPLY BRIEF OF PETITIONER

Petitioner A.H. Robins Company, Incorporated ("A.H. Robins") submits this brief in reply to the brief in opposition submitted by plaintiffs. The statement required by Rule 28.1 of the Rules of this Court is contained in A.H. Robins' petition for certiorari.

OPINION BELOW

Judge Theis' Opinion and Order denying A.H. Robins' motion for disqualification has now been reported as *In re A.H. Robins Company, Inc. "Dalkon Shield" IUD Products Liability Litigation*, 602 F. Supp. 243 (D. Kan. 1985).

ARGUMENT IN REPLY

I. The Importance Of This Case Justifies Review By This Court

Plaintiffs' first argument is that this case involves only an error by a trial judge in pretrial proceedings and therefore does not warrant review in this Court. Plaintiffs' Brief in Opposition to Petition for Writ of Certiorari ("Brief Opp.") 5. Plaintiffs thereby seek to equate Judge Theis' improper dual role as witness and judge with some run-of-the-mill pretrial discovery dispute.

The fact is that this case presents an important question—never before squarely addressed by this Court—on the permissible scope of a United States judge's activities under 28 U.S.C. § 455(a). Judge Theis' opinion has now been reported and, contrary to plaintiffs' assertion, Brief Opp. 6, obviously stands as a federal precedent. His opinion, stripped to its essentials, holds that it is perfectly proper to serve both as witness and judge *on the same facts.* (Importantly, neither plaintiffs in their Brief nor Judge Theis in his opinion deny that Judge Theis' affidavit and plaintiffs' motion for sanctions present similar issues of fact.) This pernicious ruling should be reviewed by this Court.

Next, plaintiffs argue that Judge Theis has made only a factual determination. Brief Opp. 6. This is simply wrong. Section 455(a) sets forth an objective standard of law. *See Roberts v. Bailar*, 625 F.2d 125, 128-29 (6th Cir. 1980). There is no dispute in this case on the facts, and the only issue is the correct interpretation and application of § 455(a). In addition, Judge Theis' opinion has the wide-ranging implication that a United States judge may serve as a "knight errant" by intervening as a partisan in proceedings not before him without creating any appearance of bias. *See* B. Cardozo, *The Nature of The Judicial Process* 141 (1921). Thus, the question presented to this Court is not fact-bound.

For these reasons, A.H. Robins submits that the importance of this case warrants granting the writ of certiorari.

II. The Standard For Disqualification Under § 455(a) Should Be Considered By This Court

Plaintiffs correctly point out that there is no clear-cut dispute on the legal standard under § 455(a). Brief Opp. 5-6. Yet Judge Theis' opinion, and the gloss on it by plaintiffs, suggest the need for examination of this standard by this Court.

Judge Theis' refusal to disqualify himself is improper on its face. He submitted a sworn affidavit highly critical of A.H. Robins with respect to specific matters, and now he intends to sit in judgment *on those same matters.* Plaintiffs claim the affidavit was submitted merely to "assist" the Eighth Circuit Judicial Council in the investigation of Judge Miles W. Lord. Brief Opp. 6. Plaintiffs' polite euphemism should not be allowed to obscure what is obvious—that Judge Theis acted in concert with Judge Lord with the deliberate purpose of damaging A.H. Robins.

Plaintiffs, like Judge Theis, claim his affidavit gives "rise to no reasonable apprehension of bias." Brief Opp. 7; Judge Theis' opinion at 11a in Appendix B to the petition for certiorari. This claim is incredible in light of the statements by Judge Theis in the affidavit. For example:

> Without knowing all the details, it appears that *under the circumstances known*, Judge Lord's remonstrance to the responsible company officials *was mild punishment indeed considering the strong possibility that such apparent misrepresentations and trial tactics seem to permeate the proceedings* here and elsewhere (emphasis added).

Affidavit at 23a-24a in Appendix C to the petition for certiorari. No one could reasonably think that this state-

ment shows the impartiality required of United States judges.[1]

Both plaintiffs and Judge Theis defend his conduct on the ground that his affidavit was not based on "extrajudicial" sources and that his private, ex parte communications with Judge Lord's counsel were proper. This argument is not sound.

The affidavit and its sources were extrajudicial for at least three reasons: First, A.H. Robins was never given notice or an opportunity to be heard in connection with Judge Theis' consideration of the affidavit. Judge Theis, with the help of Judge Lord's counsel, conducted a private investigation without the presence or knowledge of A.H. Robins. This private investigation was extrajudicial because it took place outside the adversary process.

Second, Judge Theis based his affidavit on sources *outside* the record before him in MDL-211. Indeed, in his affidavit Judge Theis stated that based on his experience in MDL-211 he was "satisfied" with A.H. Robins' responses to plaintiffs' discovery. Affidavit at 21a in Appendix C to the petition for certiorari. The basis for Judge Theis' criticism of A.H. Robins was not the record in MDL-21—it was his ex parte communications with counsel for Judge Lord. *Id.*

Finally, Judge Theis knew that his affidavit would become a public document. Plaintiffs state that his affidavit "made its way into the public record but not through any action by Judge Theis." Brief Opp. 9. This is mistaken. Judge Theis voluntarily submitted the affidavit in a separate proceeding he knew had been opened to the public at the express request of Judge Lord.

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[1] Because the Judicial Panel on Multidistrict Litigation has denied A.H. Robins' motion to transfer under 28 U.S.C. § 1407, Judge Theis will remain as the transferee judge in MDL-211. In re A.H. Robins Co., Inc. "Dalkon Shield" IUD Products Liability Litigation, MDL-211 and -631 (J.P.M.L., May 28, 1985).

In contrast to the facts here, this Court in *United States v. Grinnell Corp.*, 384 U.S. 563, 582-83 (1966), approved Judge Wyzanski's conduct in reviewing the record created by the parties to the case before him. (Judge Wyzanski acted at the express request of the parties to assist in settlement negotiations.) There are no points of similarity between the conduct approved in *Grinnell* and Judge Theis' private investigation here. *See SCA Services, Inc. v. Morgan*, 557 F.2d 110, 116 (7th Cir. 1977) (Inquiry by judge to his brother "creates an impression of private consultation and appearance of partiality"); *Code of Judicial Conduct for United States Judges*, Canon 3(A)(4) ("A judge should neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding").

This case is the logical next step after *Grinnell* for this Court in defining the meaning of "extrajudicial" in the federal law of disqualification. Since this case arises on clear, undisputed facts, and because the issue is important to the federal judiciary, certiorari should be granted.

CONCLUSION

For the reasons stated above and in its petition for certiorari, A.H. Robins requests this Court to grant the writ of certiorari to review the judgment of the Tenth Circuit.

Respectfully submitted,

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